In the case of the Minneapolis & St. Louis Railroad a most interesting discrimination is made. Its return for Minnesota business of 4.4 per cent. on the estimated value of property in that State in one year and of 3.5 per cent. in another, and of less than 3.7 in still another year, is held to be inadequate, and the court holds that the Minnesota rates would not permit a fair return to this company. The decree of the court below, therefore, so far as it rests on the confiscatory character of the rates applied to the Minneapolis & St. Louis Railroad Company is affirmed, with the right to the State Commission to issue further orders or decrees if by reason of a change in conditions the State rates should be found sufficient to yield a reasonable return to the company. This manifestly changes the outlook for weak companies under Federal or State regulation. A discrimination is set up, an exception allowed, and the privilege of exacting higher rates is granted. That privilege, however, when exercised under competitive conditions would be of little value.

—*New York Times.*

THE FEDERAL EMPLOYERS' LIABILITY ACT.

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I. The General Power of Congress to Regulate the Relation of Master and Servant.

In the light of the decisions of recent years, there no longer remains any shadow of doubt that congress, in the exercise of its constitutional power to regulate interstate and foreign commerce, may regulate the relations of interstate carriers and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the federal constitution, and to the qualification that the particulars in which those relations are regulated must have some real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.[1] It is equally well settled that the duties of com-

1. **General power of congress to regulate relation of master and servant.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

mon carriers with respect to the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real and substantial relation to such commerce, and are, therefore, within the range of this power.[2] In other words, the employees of persons and corporations engaged in interstate commerce are instrumentalities of such commerce,[3] and while as a general rule the police power belongs to the states, congress, in the exercise of its power to regulate such commerce, may enact restrictive or benevolent regulations for the benefit of those employees, which regulations are, in their essential nature, police regulations.[4]

It is no valid objection to such regulations that they change or modify long-settled principles of the common law. There is no vested right in any rule of the common law, except in so far as our legislatures, state and national, may be bound down by constitutional limitations; there is no pe-

2. **Same—Duty with respect to safety—Liability for injuries.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Plummer *v.* Northern Pac. R. Co. (C. C.), 152 Fed. 206; St. Louis, etc., R. Co. *v.* Conley (C. C.), 187 Fed. 949; Owens *v.* Chicago, etc., R. Co., 113 Minn. 49, 128 N. W. 1011; Snead *v.* Central, etc., R. Co. (C. C.), 151 Fed. 608; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494. Contra: Howard *v.* Illinois Cent. R. Co. (C. C.), 148 Fed. 997, reversed in The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Brooks *v.* Southern Pac. R. Co. (C. C.), 148 Fed. 986; Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, reversed in Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

3. **Employees as instrumentalities of commerce.**—Snead *v.* Central, etc., R. Co. (C. C.), 151 Fed. 608.

4. **Nature of regulations enacted by congress.**—Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Snead *v.* Central, etc., R. Co. (C. C.), 151 Fed. 608; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Hoke *v.* United States, 227 U. S. 308, 57 L. Ed. —, 33 Sup. Ct. —.

culiar sanctity attaching to those principles of the common-law system which hold that a servant must be held to have assumed the risks ordinarily incident to his employment, including the risk of injuries resulting from the negligence of his fellow servants, and that he is not entitled to recover for any injury to which his own negligence was a contributing cause. On the other hand, the trend of present day enlightened opinion is away from such principles as being unduly harsh and oppressive to the servant class, and opposed to the better reason; and certain it is that congress, keeping within the sphere of its delegated powers, and subject to the constitutional restraints with which it is hedged about, may modify or abolish them and substitute new rules, evincing a new policy, as to it may seem good.[5]

And it is elementary that in passing upon the validity of such legislation the courts are limited, as they are in all cases, to the sole question of power. The wisdom, policy or expediency of the act, whether it is the best means that might have been chosen for the accomplishment of the desired end, or whether its enforcement will not be productive of more hardship and give rise to a train of evils, real or imaginary, greater than those which it was designed to correct, are considerations which address themselves solely to the legislative branch of the government, and its decision thereon, as embodied in the completed act, is not subject to judicial review.[6]

No Power over Carriers and Employees While Not Engaged in Interstate Commerce.—The plenary power conferred upon congress by art. 1, § 8, of the federal constitution is the power to regulate that commerce which comes within the description of interstate and foreign, and among the Indian tribes. There is no grant of power with respect to that com-

5. **Modification of common-law rules.**—Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, reversed on other points in Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

6. **Judicial review—Wisdom, policy, or expediency—Courts limited to question of power.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893.

merce which is wholly internal or intrastate; and in addition to the want of any express grant of power with respect to such commerce, the necessary implication, arising from the dual nature of our political system, and which operates to confine the activities of both the state and national governments to their respective spheres of action, forbids that congress should undertake to regulate that commerce within the states which is wholly domestic or intrastate.[7]

This principle, of course, is perfectly plain and elementary. The difficulty arises from the fact that the vast proportion of the transportation business of the country is carried on by corporations engaged in commerce of both descriptions, the same train and oftentimes the same car carrying goods or passengers, some of which are being moved in interstate commerce, while others are being transported in that commerce which is wholly intrastate. The power of congress with respect to so much of the business of any particular carrier as properly comes under the head of interstate is not defeated, however, by reason of the fact that such carrier is also engaged in commerce which is purely intrastate. The regulation of intrastate commerce, if it can be so called, which may result in such case, is incidental and due to the manner or method in which the carrier conducts its business, and to the fact that it thus commingles its interstate and intrastate business.[8]

On the other hand, in view of the recent authoritative utterances of the federal supreme court, it may be regarded as con-

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7. **No power over carriers or employees while not engaged in interstate commerce.**—Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 738.

8. **Same—Carriers engaged in both interstate and intrastate business.**—Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832.

clusively settled that an employer engaged in interstate transportation does not bring his entire business, including that which is intrastate as well as that which is interstate, within the legislative power of congress; nor does the interstate commerce clause of the federal constitution authorize congress to extend the provisions of an employers' liability act to those employees engaged in commerce which is wholly intrastate, except in so far as their negligence or misfeasance may affect that commerce which may be denominated interstate.[9] Therefore an act addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the nature of the business in which they are engaged at the time of the injury, of necessity includes subjects wholly outside the power of congress under the commerce clause of the constitution, and is unconstitutional and void.[10] And where the provisions of such an act applicable to both interstate and intrastate employees are so interblended as to be inseparable, the statute must fail as a whole.[11]

Where Injury to Interstate Employee Results from Negligence of Employee or Agency Not Engaged in Interstate Commerce.—Notwithstanding the principle above stated, that an employer engaged in interstate transportation does not bring his entire business, intrastate as well as interstate, within the legislative power of congress, and that congress has no authority to extend the provisions of an employers' lia-

9. **Same—Same—Intrastate business not brought within legislative powers of congress.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 739.

10. **Act extending to employees injured while engaged in intrastate commerce, unconstitutional.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 738.

11. **Same—Separability of act.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S Ct. 141; Atchison, etc., R. Co. *v.* Mills, 49 Tex. Civ. App. 349, 108 S. W. 480; Brooks *v.* Southern Pac. Co. (C. C.), 148 Fed. 986; Howard *v.* Illinois Cent. R. Co. (C. C.), 148 Fed. 997.

bility act to those employees engaged in commerce which is wholly intrastate, it must be conceded that, in the exercise of its power to legislate for the better protection and safety of those employees who are engaged in interstate commerce, congress has the power to protect them and the commerce in which they are engaged from dangers from whatever source arising, and may, as it has done, extend the provisions of such an act to include the case of injuries to employees engaged in interstate commerce even where such injury results from the negligence of an employee engaged wholly in intrastate commerce. Thus in the Second Employers' Liability Cases, the court said:

"The second objection proceeds upon the theory that even although congress has power to regulate the liability of a carrier for injuries sustained by one employee, through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory in that it treats the source of the injury rather than its effect upon interstate commerce as the criterion of congressional power. * * * It is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce, for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."[12]

The criterion, therefore, is not whether the agency or employee inflicting the injury was engaged at the time in interstate commerce, but the effect of the negligent act or omission upon such commerce.[13]

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12. Where injury to interstate employee results from negligence of employee or agency not engaged in interstate commerce.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

13. Same—Effect of negligent act or omission upon such commerce the true criterion.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Lamphere *v.* Oregon R., etc., Co. (C. C.), 196 Fed. 336, 340; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942. See, also, Hall *v.* Chicago, etc., R. Co. (C. C.), 149 Fed. 564 (decided under the Act of 1906), and Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893.

In Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirm-

In the District of Columbia, Territories, and Places under Exclusive Federal Control.—The federal power of regulation between the states rests solely upon the interstate commerce clause of the constitution,[14] and, as we have seen, does not extend to commerce which is wholly of a domestic character. But with respect to the territories, the District of Columbia, and places under exclusive federal control, the legislative power of congress is plenary, and, so far as commerce is concerned, is not dependent upon any special grant of power such as the commerce clause of the constitution; so that congress has the power to regulate their commerce, not only with other territories, states, nations and Indian tribes, but, by virtue of its general power to govern, it possesses sole and exclusive authority to regulate their internal and domestic commerce as well.[15] Hence it might be, and in the case of the first Employers' Liability Act was so held, that a statute which was unconstitutional in so far as it undertook to regulate the liability of carriers for injuries to their employees while engaged in that commerce which was wholly internal and domestic within the

ing 180 Fed. 832, it appeared that the plaintiff was struck by a train while he and other employees were engaged in repairing a switch connected with a track over which both interstate and intrastate trains passed. In passing upon this point, the court said: "The plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this act. That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not."

In Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893, it was held that the facts disclosed by the complaint did not make it necessary to decide this point, but that the purpose to render a carrier engaged in interstate commerce liable to employees so engaged being apparent, the provisions were separate, whatever might be the rule regarding an injury resulting to an interstate employee from the negligence of an employee not so engaged. Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893.

14. **Power of congress in District of Columbia, territories, and places under exclusive federal control, not dependent upon interstate commerce clause.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

15. **Same.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

states, would be valid in so far as it attempted to regulate the same subject with respect to carriers and their employees engaged wholly in internal and domestic commerce within the District of Columbia and the territories.[16]

Power Extends to All Carriers, Both on Land and Water.—With respect to that commerce over which its power extends congress has authority to legislate for the safety and protection of the employees of all carriers while engaged in such commerce, whether the transportation be on water or on land,[17] though, as we shall hereafter see, the provisions of the present act extend only to carriers by rail.

II. State Power and Its Limitations.

The power of the states, commonly known as the police power, to control the conduct of individuals therein for the safety of the community is not taken away by the commerce clause of the federal constitution merely because some remote influence on interstate commerce may result; but state legislation which directly and intentionally controls and regulates interstate commerce is prohibited.[18] Definitions of the police power must be taken subject to the condition that the state can not, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or upon rights granted or secured by the supreme law of the land.[19] With respect to the liability of common carriers for injuries to their employees growing out of their negligence or the negligence of their other employees, the subject is clearly a proper one for police regulation, and the states

16. **Same—Act may be valid as to territories while invalid as to states.**—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

17. **Power of congress extends to all carriers, whether by land or water.**—Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522.

18. **State power and its limitations.**—State *v.* Chicago, etc., R. Co., 136 Wis. 467, 117 N. W. 686; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

19. **Police power not to be so exercised as to encroach upon federal powers or rights protected by federal constitution.**—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 661, 29 L. Ed. 516, 6 S. Ct. 252; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

have the power, when they choose to exercise it, to make regulations on that subject, even though they may extend to and control rights and liabilities as between carriers and their employees while engaged in interstate commerce; provided, always, there is no existing federal legislation covering the same field. Such statutes, so long as they do not unreasonably interfere with interstate commerce, are not considered regulations of interstate commerce, notwithstanding they control, in some degree, the conduct and liability of those engaged in such commerce, but come rather within the category of those matters as to which the power of congress is not exclusive per se, and concerning which the states may legislate until congress shall see fit to exercise the power vested in it. But when congress assumes to exercise its powers by enacting legislation covering the particular subject, all state legislation upon the same subject is superseded and becomes inoperative in so far as it affects the rights and liabilities of carriers and their employees while engaged in interstate commerce, and without regard to whether it is in terms abrogated or not.[20]

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20. Regulation of interstate carriers and employees—Power of congress not exclusive—Superseding state legislation.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819; Missouri, R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 32 S. Ct. 109; Chicago, etc., R. Co. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675; Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 44 L. Ed. 192; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606; St. Louis, etc., R. Co. *v.* Hesterly (Ark.), 135 S. W. 874; Missouri, etc., R. Co. *v.* Castle (C. C.), 172 Fed. 841; Missouri R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1, 3; Missouri, etc., R. Co. *v.* Sadler (Tex. Civ. App.), 149 S. W. 1188; Bottoms *v.* St. Louis, etc., R. Co. (C. C.), 179 Fed. 318; Hall *v.* Louisville, etc., R. Co. (C. C.), 157 Fed. 464; Whittaker *v.* Illinois, etc., R. Co. (C. C.), 176 Fed. 130; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Fulgham *v.* Midland Val. R. Co. (C. C.), 167 Fed. 660; Taylor *v.* Southern R. Co. (C. C.), 178 Fed. 380; Rich

Territorial Statutes Superseded.—In view of the direct control which congress has over the territories, the principle just stated, with respect to state laws affecting interstate commerce being superseded by acts of congress, applies with even stronger force to statutes enacted by territorial legislatures, or, in the absence of legislation, to the rules of the common law in force within the territories. In either case, rules regulating the liability of carriers for the death or injury of their employees are superseded by the legislation of congress in so far as it covers the same field.[21]

III. The Federal Acts Considered.

A. Text of the Acts and the Amendments Thereto.—Act of June 11, 1906, 34 Stat. L. 252.—See the text of this act, which was held unconstitutional in the first Employers' Liability Cases,[22] set out in the footnotes.[23]

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v. St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011; Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307; Cound *v.* Atchinson, etc., R. Co. (C. C.), 173 Fed. 527.

21. Superseding territorial legislation.—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Cound *v.* Atchinson, etc., R. Co. (C. C.), 173 Fed. 527; American R. Co. *v.* Didricksen, 33 S. Ct. 224, 225.

22. The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

23. ACT OF JUNE 11, 1906, 34 STAT. L. 232.

"§ 1. That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several states, or between any Territory and another, or between any Territory or Territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

"§ 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or

ACT APRIL 22, 1908, CH. 149, 35 STAT. L. 65.

§ 1. (Liability of railroads for injuries to employees.) That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any

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where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

"§ 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee: Provided, however, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

"§ 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

"§ 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the Safety Appliance Act of March, second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three."

defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 2. (Damages for injuries in territories, District of Columbia, canal zone, etc.) That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 3. (Contributory negligence of employee.) That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 4. (Assumption of risk of employment.) That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 5. (Agreements, etc., for exemption from liability—set off of insurance, etc., contributions.) That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 6. (Time limit for actions.) That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

§ 7. (Receivers.) That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 8. (Prior laws not affected.) That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of congress, or to affect the prosecution of any pending proceeding or right of action under the act of congress entitled "An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

AMENDMENT, ACT OF APRIL 5, 1910, CH. 143, 36 STAT. L. 291.

§ 1. (Liability of railroad common carriers to employees—Time limit of actions—Jurisdiction—Concurrent jurisdiction of state courts.) That an act entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

§ 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

§ **2. (Survival of actions in case of death.)** That said Act be further amended by adding the following section as section nine of said act:

§ **9.** That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

B. Reason, Purpose and General Nature of Act.—By this act congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce.[24] The underlying reason for the act, as well as the general object sought to be accomplished thereby, is plain upon its face. The reasoning of the cases in which the fellow-servant rule has been laid down by the courts has, in view of modern methods and conditions, lost much, and in some cases all, of its force, and in at least one case decided under these acts the rule as well as the reason upon which it is based, has been pronounced archaic.[25] The rules as to assumption of risk and contributory negligence, as applied by the courts, in view of modern conditions surrounding those engaged in certain occupations, are manifestly harsh, cruel, and unjust, and ought long since in the furtherance of justice and the interest of humanity to have been greatly modified. And in view of the well-known fact, of which congress and the courts take constant

24. Reason, purpose, and general nature of act.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

25. Same.—Snead *v.* Central, etc., R. Co. (C. C), 151 Fed. 608; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

notice, that the great employers of labor and their employees do not stand upon an equality, and that as a class the great proprietors are in a position to prescribe terms and lay down rules which laborers are practically constrained to obey, there are certainly substantial reasons why employers engaged in certain occupations should not be permitted to relieve themselves by any contract, rule or regulation from liability for injuries caused by their negligence or by the negligence of their other employees.[26]

It is plain, therefore, that the present act reflects, and is in harmony with, what may be said to be the strong trend of the public mind in nearly all civilized countries at this time, and to quote the language of Judge Rogers in a case which arose in the Federal Circuit Court for the Western District of Arkansas: "It proceeds on the theory that the railroad corporations are quasi public corporations, and that the railroad company in the first place, and the public in its final analysis, should be insurers of the lives and persons of its employees while engaged in interstate commerce, for if the railroad companies are to be the insurers of their employees they must in the end be reimbursed also by their customers for whom they do the carrying business, and in its last analysis their customers are simply the public. The theory of this legislation is that the public should share the misfortunes of the families of those who are injured or killed in the quasi public business in which railroads are engaged. So it is provided, in substance, where the employee is injured in the service of a railroad while engaging in interstate commerce, he shall have a cause of action for that injury, and this action he can maintain in his own name, although he may have by his own negligence contributed to the injury; but the damages in such case shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Here the common-law doctrine of contributory negligence is abrogated in the interest of the employee and the doctrine of comparative negligence substituted, which, pro tanto, encourages care and diligence upon the part of the employee."[27]

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26. Same.—Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Fulgham *v.* Midland Val. R. Co. (C. C.), 167 Fed 660.

27. Same.—Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660, 663. See, also, Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

The Act of 1906 was held to be unconstitutional by the Supreme Court in an opinion filed on January 6, 1908, on the ground that it attempted a regulation of the liability of interstate carriers for injuries to their employees not only while engaged in interstate commerce, but attempted also to prescribe the rules governing the liability of such carriers as to all their employees, intrastate as well as interstate, and regardless of whether engaged in interstate commerce at the time of the injury or not.[28] In holding the act invalid, however, the court anticipated the possible objection of the want of power in congress to legislate upon the subject under any circumstances, and intimated that congress had the power to enact such a regulation if restricted in its application to interstate carriers and their employees, and to injuries sustained while engaged in such commerce. On the 31st day of January, 1908, the President, in a special message to congress, called its attention to that decision and earnestly recommended the enactment of a statute to apply only to the class of cases upon which the court had decided it could constitutionally legislate, and congress being in session at the time, the present act was introduced, was carefully considered by the Judiciary Committee of the house, and thereafter enacted as a law at that session, and approved by the president on April 22, 1908, only a little more than three months after the supreme court had declared the former act unconstitutional.[29]

C. Scope of Act.—Unlike the former act, which embraced common carriers of every description, the present act applies only to carriers by railroad, while engaging in interstate or foreign commerce, and only to an employee "suffering injury while he is employed by such carrier in such commerce." In order to establish a cause of action under the act, therefore, the offending carrier at the time of the injury must have been engaged in interstate and foreign commerce, and the injury must have been suffered by the employee while employed by such carrier in such commerce. Both these facts must be present or the act does not apply—the carrier must be actually engaging in interstate com-

28. Same.—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

29. Same.—Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942, 945.

merce, and the employee must also be taking part therein. If, therefore, the business being done by the carrier is purely intrastate, and in the course of such business it injures an employee, the act does not apply. Neither does it apply, although the business being done by the carrier is commerce between the states, if the injured employee is engaged in work that does not properly belong to such commerce.[30]

But as the present act was clearly passed to meet the objection of the decision in the first Employers' Liability Cases,[31] it was doubtless the purpose of congress to comprehend within its provisions the whole subject of the relations of common carriers by rail and their employees engaged in interstate commerce,[32] and it is held that it must be construed as including within the terms "every common carrier by railroad," and "person employed in such commerce," every carrier and every person whom congress could constitutionally include.[33] Hence, if the conditions above stated concur, namely, that the injury was sustained while the carrier was engaging in interstate commerce, and to an employee of such carrier while he was also engaged therein, the fact that the carrier and the employee were also engaged at the

30. Scope of Act—Both carrier and employee must have been engaged in interstate commerce at time of injury.—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874; Lamphere *v.* Oregon R., etc., Co. (C. C.), 193 Fed. 248, reversed on application of this rule to facts in 196 Fed. 336; Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858, 859; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737.

Under the terms of the first act, where a railroad company by which plaintiff was employed was an interstate carrier at the time plaintiff was injured, it was held that it was not material to plaintiff's right to the benefit of the act, that the train on which plaintiff was injured was an intrastate train. Hall *v.* Chicago, etc., R. Co. (C. C.), 149 Fed. 564.

31. The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

32. Same—Designed to include every carrier and every person whom congress could constitutionally include.—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1003.

33. Same—Same.—Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

same time in intrastate commerce, using perhaps the same means and agencies for both, is immaterial.[34] And since the same man may have duties including both interstate and intrastate commerce, it follows that the act will not necessarily apply to the same person in all the details of his employment, but that he will be subject to the act while engaged in the one and not in the other.[35] Whether in such case a cause of action arises under the act depends upon the circumstances existing at the time of the injury. If at the time of the injury, the employee was performing some service for the company in furtherance of its interstate commerce the rules of law declared in the Act of 1908, and its amendment, will apply. Upon the other hand, if the employee, when injured, is engaged wholly in the performance of a service in furtherance of the intrastate business of the railroad company, then the act of congress does not apply, because to give it application in such case would be extending the power of the federal government over matters exclusively within the state jurisdiction and control.[36]

Not Necessary That Carrier and Employee Should Have Been Engaged in Same Act.—The act apparently does not require that the carrier and the injured employee should both be engaged in the same act of interstate business. Commerce between the states has many divisions and subdivisions, and, if the carrier while engaged in doing one kind of interstate work should injure an employee who is engaged in doing another kind of such work, the remedy provided by the act appears to be available.[37]

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34. **Same—Same—Immaterial that carrier and employee were also engaged in intrastate commerce at time of injury.**—Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, 903, affirming 180 Fed. 832; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

35. **Not applicable to same person in all details of his employment.**—Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, 837, affirmed in 113 C. C. A. 379, 192 Fed. 901.

36. **Same—Applicability of act dependent upon circumstances existing at time of injury.**—Van Brimmer *v.* Texas, etc., R. Co. (C. C.), 190 Fed. 394.

37. **Not necessary that carrier and employee should have been engaged in same act.**—Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 739.

D. Principal Changes Made by Act.—Fellow Servant Rule Abolished.—This, of course, was one of the main objects, if not the principal object, of the act, it being twice provided that the cause of action given shall arise and the carrier be liable in damages "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."[38] It may be stated in this connection that in determining who are fellow servants within the meaning of the act, the federal courts follow the rule of the federal supreme court, and not the doctrines of the state courts;[39] and that a railroad section foreman and the members of the crew working under him are fellow servants within the rule of the federal courts.[40] And where plaintiff, a track walker, was injured while assisting certain fellow employees in repairing a switch in a railroad yard by being struck by certain cars, kicked toward him, and from the relative position of plaintiff and his fellow employees the jury could have found that plaintiff was relying on them to look out for trains approaching from that direction, their failure to warn him constituted negligence of fellow servants which, as provided by the act, gave a right of action against the railroad company.[41]

Doctrine of Contributory Negligence Modified.—By § 3 of the act it is provided that "no such employee who may be injured or killed shall be held to have been guilty of contributory

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38. Fellow-servant rule abolished.—See the Act of April 22, 1908, §§ 1, 2. See, also, Northern Pac. R. Co. *v.* Maerkl (C. C.), 198 Fed. 1, 6; Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, 902, affirming 180 Fed. 832.

39. Fellow servants within meaning of act.—Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893, 895, citing Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772, 13 S. Ct. 914.

40. Section foreman and members of train crew under him.—Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893, 895, citing Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 33 L. Ed. 1009, 14 S. Ct. 983; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994, 16 S. Ct. 843; Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999, 16 S. Ct. 848; Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 41 L. Ed. 1051, 17 S. Ct. 603.

41. Negligence of fellow servants—What constitutes.—Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." In other words, as to cases of this character, the defense of contributory negligence is wholly abolished;[42] while as to all other cases it is provided that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[43] Under this latter part of the section, it is held that the fact that an employee's negligence is equal to or greater than that of the railroad company will not bar a recovery of any damages,[44] and that if the cause of action is established by showing that the injury resulted in whole or in part from the defendant railway company's negligence, the statute can not be nullified and the right of recovery defeated by calling the plaintiff's act the proximate cause of the injury; that the plaintiff's negligent act or omission, by whatever name it may be called, is the same act or omission, and that it is only when such act or omission on the part of the plaintiff is the sole cause—when the defendant's act is no part of the causation

42. Doctrine of contributory negligence modified.—Where a railroad engineer was furnished with an engine equipped with a water glass without any shield or guard, and on his return from his first trip applied to his foreman for a shield or guard, and was informed that defendant had none, and plaintiff was injured by the explosion thereof on another trip, defendant was negligent, and any contributory negligence of plaintiff was no defense under the act of April 22, 1908. Horton *v.* Seaboard Air Line R. Co., 157 N. C. 146, 72 S. E. 958.

It has also been held that in an action for injuries to a trackman in a railroad yard, by being struck by certain passenger cars, kicked along the track, contributory negligence is no defense. Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

43. Same—Proportionate diminution of damages.—See the Act of 1908, § 3. See, also, Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211, 213; Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, 902, affirming 180 Fed. 832; Johnson *v.* Great Northern R. Co. (C. C. A.), 178 Fed. 643, 648.

44. Same—Same—Where employee's negligence equal to or greater than that of defendant.—Louisville, etc., R. Co. *v.* Wene (C. C.), 202 Fed. 887.

—that the defendant is free from liability under the act.[45] Manifestly, therefore, to give effect to the act in such a case it is essential that the relative amounts of damages caused by the negligence of the respective parties must be determined. In the case of injury resulting in death, therefore, the jury should first find the amount of damages to which the decedent's next of kin would have been entitled in the absence of any contributory negligence on his part; and they should then abate that sum by the amount which they shall find represented the decedent's proportionate contributory negligence.[46]

By the act, the question of contributory negligence, when applicable, is one of fact, to be submitted to the jury.[47]

Provision as to Assumption of Risk.—By § 4 of the Act of 1908, it is provided that: "In any action brought against any common carrier under or by virtue of any of the provisions of this act, to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." It thus appears that under the federal statute a complaining employee to whom the act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee and which violation has contributed to his injury or death.[48]

This section is controlling with respect to any different or con-

45. **Same—Same—Doctrine of proximate cause not to be applied, when.**—Grand Trunk Western R. Co. *v.* Lindsay (C. C.), 201 Fed. 836; Louisville, etc., R. Co. *v.* Wene (C. C.), 202 Fed. 887, 892.

46. **Same—Same—How jury to proceed in diminishing damages.**—Louisville, etc., R. Co. *v.* Wene (C. C.), 202 Fed. 887, 891.

47. **Contributory negligence a question for the jury.**—Johnson *v.* Great Northern R. Co. (C. C.), 178 Fed. 643, 648; Sandidge *v.* Atchison, etc., R. Co. (C. C.), 193 Fed. 867.

48. **Provision as to assumption of risk.**—Freeman *v.* Powell (Tex. Civ. App.), 144 S. W. 1033, 1034, affirmed, no op. See, also, Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, 835, affirmed in 113 C. C. A. 379, 192 Fed. 901.

Where a railroad company was moving a car in interstate com-

trary state rule, in cases in which the federal act applies, whether such state rule be common law or statutory.[49]

And upon well-settled principles it has been held that the fact that an employee may have assumed the risk from one of two contributing causes of an injury will not defeat his right to recover, where the other cause is one for which the master is liable.[50] Thus, where one of the proximate causes of the injury was the negligence of a fellow servant of the deceased, it was held that since under the act such defense was no longer available to the defendant company, it was immaterial whether the deceased had assumed the risk of the defendant's negligence in failing to see that the flooring was properly fastened to the center sills, since the law is that it is only necessary for the plaintiff to show that one of the co-operating causes of the injury was a negligent act or omission for which the master is responsible.[51]

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merce which had a coupler so defective that it would not couple automatically by impact, as required by the Act of March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and an employee, while attempting to remedy the defect in the performance of his duty, was caught between the cars and injured, the violation of the statute by the company was a contributing cause of the injury, which rendered it liable therefor; the questions of assumption of risk and contributory negligence being immaterial, under §§ 3 and 4 of the act. Johnson *v.* Great Northern R. Co. (C. C. A.), 178 Fed. 643.

Under the Act of 1906, where plaintiff was injured while operating an unboxed saw in the car shops of defendant, an interstate railway company, by which he was employed, it was held that he did not assume the risk by voluntarily accepting employment in the shop, although the danger was obvious. Malloy *v.* Northern Pac. R. Co. (C. C.), 151 Fed. 1019.

49. Same—Supersedeas statutory or common law rule existing in state.—Freeman *v.* Powell (Tex. Civ. App.), 144 S. W. 1033, affirmed, no op.

50. Same—Where employee assumes risk of one of two contributing causes.—Northern Pac. R. Co. *v.* Maerkl (C. C.), 198 Fed. 1.

51. Same—Same.—Northern Pac. R. Co. *v.* Maerkl (C. C.), 198 Fed. 1, 6, citing Kreig *v.* Westinghouse & Co., 214 U. S. 249, 53 L. Ed. 984; 29 S. Ct. 619; Standard Oil Co. *v.* Brown, 218 U. S. 78, 54 L. Ed. 939, 30 S. Ct. 669; Deserant *v.* Cerillos Coal R. Co., 178 U. S. 409, 44 L. Ed. 1127, 20 S. Ct. 967; Morgan *v.* Robinson, 157 Cal. 348, 107 Pac. 695; Seaboard Air Line *v.* Witt, 4 Ga. App. 149, 60 S E. 1012; Labatt on Master & Servant, § 813.

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(TO BE CONTINUED.)